

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Telecommunications Relay Services And Speech-to-) Dockets 98-67
Speech Services for Individuals with Hearing and)
Speech Disabilities)

To: The Commission

***REQUEST FOR ACCEPTANCE OF COMMENTS IN RESPONSE AND
RESPONSE TO REPLY COMMENTS OF NATIONAL EXCHANGE
CARRIER ASSOCIATION, INC.***

NDS ON VIDEO RELAY SERVICES, INC.

By _____/s/_____
George L. Lyon, Jr.
Its Counsel

Lukas, Nace, Gutierrez & Sachs, Chartered
1111 19th Street, NW, Suite 1200
Washington, DC 20036
(202) 828-9472
June 10, 2004

In the Matter of)	
)	
Telecommunications Relay Services And Speech-to-))	Dockets 98-67
Speech Services for Individuals with Hearing and))	
Speech Disabilities)	

***REQUEST FOR ACCEPTANCE OF RESPONSE AND RESPONSE TO REPLY
COMMENTS OF NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.***

I. The public interest would be served by acceptance of this response.

Acceptance of this response to NECA's Reply Comments is necessary to serve the public interest. First, this response points out that NECA has ducked any substantive response to the myriad of criticisms leveled at its rate recommendation, and in doing so has mischaracterized the comments critical of its methodology. Second, acceptance of this response is necessary to point out that NECA's comments violate Rule Section 64.604(c)(5)(I) by disclosing confidential data without being so directed by the Commission, and in doing so make a materially false statement of fact with respect to HOVRS's operations. Thus, acceptance of this reply is necessary to set the record straight.

II. NECA fails to respond to the substantive criticisms of its rate proposal.

In response to the criticism leveled at its 2004-05 Rate Submission, NECA's reply comments consist essentially of the refrain, "We did what you told us to do." NECA Reply Comments at 3-4. If so, this record is devoid of any substantive instruction the Commission has given NECA to aid its determination of the appropriate VRS rate. Nothing in the Bureau's June 2003 TRS order directed NECA to use working capital as a proxy for TRS investment in determining a rate of return on investment only. Thus, NECA's statement at Reply Comments 3 that "As these commenters recognize, NECA computed its proposed rates using the rate of return method specified in the June 2003 TRS Order" is disingenuous in the extreme. NECA provides no citation to any commenter that conceded NECA followed the June 30, 2003 Bureau order. This is for good reason, since no party made such a concession. In fact, the exact opposite is the case. CSD states in its comments, "CGB has never provided NECA with sufficient guidance as to what investment base NECA should use when making its rate of return calculation." CSD Comments at 12.

Moreover, HOVRS pointedly explained that (1) NECA violated Section 64.604(c)(5)(iii)(C) in failing to obtain data for total TRS investment; (2) failed to follow Part 65's methodology for calculating the rate base, the only procedure the Commission's rules set forth for determining rate of return; and (3) violated well established principles delineating how working capital is determined. *See* HOVRS Comments at 7-15.

So the fact is commenters did not concede NECA did what the Bureau instructed it to do in the June 30, 2003, order. Rather commenters, including HOVRS, alleged NECA went off on a lark of its own in constructing a rate of return methodology nowhere sanctioned by the Commission's rules, nowhere supported by precedent, and nowhere found in the annals of rate making literature. In answer to that allegation that it directly violated the FCC's rules, that it constructed a

methodology inconsistent with Part 65, and failed to follow established methodology for determining working capital, NECA responds, with only silence and misstatement.

NECA likewise ignores the various points HOVRS made in its comments that it lacks delegated authority to second guess providers' estimates, that to the extent the Commission can and does give it the authority to do so, the Commission is required by law to closely scrutinize any adjustments made, and that providers and consumers have a due process right to specific information with respect to such adjustments. NECA simply skirts these issues and blithely asserts that "exclusion of outlier data" is a necessary part of calculating the rate. NECA Relay Comments at 3.

Among the various problems with that statement is that nobody knows what NECA considers "outlier" data since NECA has not been given no standard to judge such data and it has articulated no standard on which it judged the data.

Despite HOVRS's detailed discussion of the exclusions NECA made to its cost data, including for example, NECA's completely irrational exclusion of CPA audit funds, NECA fails to justify any of the contested exclusions HOVRS cited. Rather NECA suggests HOVRS's entire submission was an outlier because it was allegedly 41 percent higher than the "average cost" data supplied by other VRS providers. Since NECA fails, however, to provide that data for either public scrutiny or even Commission scrutiny, how can providers, carriers or consumers, or this Commission, have any confidence in NECA's assertion, and how can HOVRS even respond to it? Indeed, NECA itself conceded in its filing that it needed to explain its exclusions better. Mystifyingly, it did not. In any event, NECA's Reply Comments are once again disingenuous.¹

¹ **Particularly disingenuous is the suggestion NECA makes that it sought to "work with HOVRS to conform its submission to those of other, more representative providers." What NECA actually did was ask about a few of HOVRS's cost line items. At no point did**

NECA suggest to HOVRS prior to excluding its cost data that any item was unusual or excessive or otherwise suspect. Had NECA actually done so, HOVRS would have immediately provided NECA with a full justification of the expense, or if it agreed the expense was inappropriate or otherwise problematic, would have withdrawn or modified the item.

HOVRS’s proposed costs for 2004, extracting profit and taxes, averaged \$11.61. The same number for 2005 was \$9.62. That’s an average of \$10.62, before applying whatever rate of return figure the Commission finally decides is appropriate. That is plainly not an “outlier” number, and that would plainly have been apparent if NECA had provided sufficient data so the public could subject its calculations and analysis to critical review. But NECA did not. And that is the crux of the problem with what it has done. It jumbled a bunch of numbers in a black box hidden from public scrutiny and told the Commission, providers and the public to trust that it did the right thing.

We already know, however, from what NECA has chosen to disclose that it failed to follow the Commission’s established rate of return methodology. Under the circumstances, how can the Commission, providers or the public have any confidence that what NECA did totally in secret was appropriate?

For example, what are the criteria NECA used to consider a figure an outlier? It does not say. Did NECA look at outliers that were *substantially below* the average cost of all providers. If not, what is the rationality of that decision? Outliers can be both high and low. Both are equally suspect, or should be if the intent is to arrive at a fair rate for providers, carriers and consumers. Yet, NECA fails to give any information that would indicate it examined unusually low as well as unusually high numbers. Significantly, after NECA made its adjustments to HOVRS’s data, HOVRS’s Northwest Call Center’s allowed costs came in at only 78 percent of the average of all other providers. Yet, this “outlier” number does not appear to have prompted NECA to think “well, maybe we acted a bit overzealously in slashing costs from HOVRS’s estimates.” How curious.

Moreover, how could NECA even determine that a provider’s data was an outlier when it had no standard to measure the quality of service proposed. Only HOVRS gave it data on its

proposed grade of service. (Other providers cannot really be blamed for this omission, since NECA did not ask for this data.) Plainly a provider that proposed an average answer speed of 20 seconds and who would offer 24 hour service will have higher costs than one who proposes to make consumers wait five minutes on average to obtain an interpreter, and who limits its service to 16 hours a day. That hardly makes the provider proposing on demand service an outlier. Yet, the Commission is deprived of any information on the answer speed or hours of operation of providers in NECA's rate proposal.

It is perfectly plain why NECA failed to justify any specific exclusion which HOVRS and others discussed in their comments. The answer is because if it had, it would have exposed the ad hoc, seat of the pants, arbitrary, standardless approach NECA apparently employed. The inference that NECA made these exclusions and similar exclusions to other providers' data as a result oriented exercise to cap the VRS rate in an attempt to please this agency keeps surfacing from these facts. Although we are reluctant to suggest such a motivation, NECA's total failure to respond with even minimal depth to the criticisms leveled at its rate recommendation by HOVRS and others reinforces that inference.

Finally, at note 13 of its comments, rather than respond to any specific criticism, NECA takes the opportunity for a pot shot at HOVRS. It asserts, "Based on submitted data [the source of which NECA does not deign to disclose], it appears that HOVRS provides VRS under contract to other providers at a cost per minute that is approximately eighty percent lower than the cost of it providing VRS directly." Now what is the point of that statement? To try to cast doubt on HOVRS's credibility when NECA refused to discuss the substance of HOVRS's comments is

regretful. Even more regretful is that NECA violated this agency's rule, and in so doing tendered false information.

First, NECA's gratuitous comment concerning HOVRS directly violates this Commission's rules. Specifically NECA's pot shot violates FCC Rule Section 64.604(c)(5)(I). This provision states: "The administrator shall keep all data obtained from contributors and TRS providers confidential and shall not disclose such data in company-specific form unless directed to do so by the Commission." NECA's purported "disclosure" of HOVRS's contract terms with other VRS providers directly violates this rule. The Commission has not directed NECA to disclose HOVRS's carrier contract information. To be sure, HOVRS disclosed certain exclusions NECA made to HOVRS's data. HOVRS did not discuss its contracts with other VRS provider, however, either in its data submitted to NECA or in its comments. HOVRS's contracts with other VRS providers are governed by confidentiality provisions which prohibit HOVRS from disclosing the terms of those agreements. Thus, HOVRS did not waive confidentiality of those agreements. And, although HOVRS specifically requested the Commission to order the disclosure of all submitted data, the Commission has not yet done so. What NECA has apparently tried to do then is to disclose data submitted by other VRS providers [apparently HOVRS's contracting carriers] in an attempt to

deflect HOVRS's and others' well deserved criticism of its rate submission, but in violation of the FCC's rules.²

² Plainly, the Commission must sanction NECA for this blatant violation of the FCC's rules.

Second, what is even more unfortunate about NECA's attempted pot shot is that it is false. Although HOVRS cannot disclose the terms of its carrier agreements, it can say that neither singly nor combined does it offer VRS at a rate even approaching 80 percent lower than it provides VRS service for itself. HOVRS makes this statement here *under oath*,³ and HOVRS challenges NECA either to dispute this statement *under oath* or withdraw its erroneous Reply Comments. In fact, both of HOVRS carrier agreements were negotiated prior to the Bureau's June 30, 2003 rate order. As a result of that order, both agreements had to be renegotiated because they rendered provision of VRS service commercially impracticable.⁴

³ See Declaration of Ronald E. Obray, attached as Exhibit 1, hereto.

⁴ Due to the inartful wording of NECA's attempted pot shot, it is not even completely clear what NECA is talking about. Is NECA asserting HOVRS currently offers VRS 80 percent lower than what it receives from the VRS fund? Is NECA suggesting HOVRS is offering VRS 80 percent lower than its proposed VRS costs for 2004-05. Is NECA suggesting HOVRS is proposing to offer its carriers in 2004-05 VRS 80 percent lower than its projected costs? Whatever NECA meant, under any interpretation of its inartful opprobrium, NECA's statement is patently false.

III. Conclusion.

In summary, NECA has failed to respond to the specific, pointed criticisms of its TRS rate proposal. That failure should reinforce the view that the Commission cannot have confidence in the proposed TRS rates NECA has recommended. The Commission should reject NECA's recommendations and send them back to NECA with appropriate instructions concerning the rate of return methodology to be followed, and with instructions to fully explain and justify on the record any exclusion of provider cost data. Alternatively, the Commission should set the 2004-05 TRS rates for an expedited evidentiary hearing before an administrative law judge so that the rates can be set on appropriate evidence, including the sworn testimony of providers, consumers and NECA personnel. In the meantime, the Commission should continue on an interim basis the 2003-04 TRS rates pending resolution of the appropriate rates for 2004-05.

Respectfully submitted,

HANDS ON VIDEO RELAY SERVICES, INC.

By _____/s/_____
George L. Lyon, Jr.
Its Counsel

Lukas, Nace, Gutierrez & Sachs, Chartered
1111 19th Street, NW, Suite 1200
Washington, DC 20036
(202) 828-9472
June 10, 2004

DECLARATION OF RONALD E. OBRAY

Ronald E. O Bray, under penalty of perjury, deposes and states as follows:

1. My name is Ronald E. O Bray. I am President of Hands On Video Relay Services, Inc. I am making this declaration for submission to the Federal Communications Commission.
2. I have read the Reply Comments submitted by NECA on June 2, 2004 in Docket 98-67. Those Reply Comments state that HOVRS provides VRS to its carrier customers at a rate 80 percent less than it provides for itself. Although that statement appears to be ambiguous, there is no interpretation of that statement under which it is true. That statement is completely false as explained in HOVRS's response.
3. I cannot disclose the substance of HOVRS's contracts with its carrier customers unless ordered to do so by the Commission because of confidentiality provisions in those agreements. At no point did HOVRS disclose the substance of its carrier agreements to NECA in its 2004-05 VRS cost estimates. Thus, to the extent NECA has any data concerning those contracts, it must have received it from HOVRS's carrier customers. In any event, as stated above, NECA's characterization of those agreements is completely false.

The above statement, given under penalty of perjury is true and correct to the best of my knowledge and belief.

June 10, 2004

_____/s/_____
Ronald E. O Bray

Certificate of Service

I, George L. Lyon, Jr., do hereby certify that I have caused copies of the foregoing Request For Acceptance of Response And Response to Reply Comments of National Exchange Carrier Association, Inc. to be served on the following via first-class mail, except where noted, postage pre-paid:

**Katherine Keller
Publisher, STSnews.com
P.O. Box 88
Belleville, WI 53508**

**Beth Wilson, Ph.D.
Executive Director, SHHH
401 9 Street, N.W., Suite 400
Washington, D.C. 20004**

**Michael B. Fingerhut, Esq.
Richard Juhnke, Esq.
Sprint Corporation
401 9 Street, N.W., Suite 400
Washington, D.C. 20004**

**Claude Stout
Executive Director
Telecommunications for the Deaf, Inc.
8630 Fenton Street, Suite 604
Silver Spring, MD 20910-3803**

**Brenda Battat
SHHH
Suite 1200
7910 Woodmont Ave
Bethesda, MD 20814**

**Mark C. Rosenblum, Esq.
Peter H. Jacoby, Esq.
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920**

**Karen Peltz-Strauss, Esq.
Counsel for Communications Services for
the Deaf, Inc.
KPS Consulting
3508 Albermarle St
Washington, DC 20008**

**Nancy J. Bloch
Executive Director
National Association of the Deaf
814 Thayer Avenue
Silver Spring, MD 20910-4500**

**David O'Connor, Esq.
Counsel for Hamilton Relay
Holland & Knight LLP
2099 Pennsylvania Ave., NW, Suite 100
Washington, DC 20006**

**Mr. Tom Chandler, Esq.
Chief, Disability Rights Office, Consumer
& Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554**

Mr. Greg Hlibok, Esq.
Consumer and Governmental Affairs
Bureau
Federal Communications Commission
445 12th Street, SW
Rm: 6-C224
Washington, DC 20554

Ms. Janet Sievert, Esq.
Consumer and Governmental Affairs
Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Beth Wilson
Executive Director
Self Help for Hard of Hearing People
7910 Woodmont Ave., Suite 1200
Bethesda, MD 20814

Larry Fenster, Esq.
MCI
1133 19th Street, NW
Washington, DC 20336

Ms. Amy Brown, Esq.
Consumer and Governmental Affairs
Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Mr. Genero Fulano, Esq.
Consumer and Governmental Affairs
Bureau
Federal Communications Commission
445 12th Street, SW

Washington, DC 20554

Ms. Cheryl King, Esq.
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

John Archer, Esq.
Hagan Wilka & Archer, P.C.
Suite 418
100 S. Phillips Avenue
Sioux Falls, SD 57105

Kelby Brick, Chair
Deaf and Hard of Hearing
Consumer Advocacy Network
814 Thayer Avenue
Silver Spring, MD 20910-4500

Julie Miron
Communications Access Center
1631 Miller Road
Flint, Michigan 48503

K. Dave Snowden
Chief
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commissioner Kevin J. Martin
Federal Communications Commission

**445 12th Street, SW
Washington, DC 20554**

**Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554**

**Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554**

**Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554**

**Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554**

**Scott Bergmann, Esquire
Office of Comm. Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554**

**Christopher Libertelli, Esquire
Office of Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554**

**Matthew Brill, Esquire
Office of Comm. Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554**

**Jessica Rowenworcel, Esquire
Office of Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554**

**Jason Williams, Esquire
Office of Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554**

_____/s/_____
George L. Lyon, Jr.